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Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: WC Docket Nos. 18-141; 17-144; 16-143; & 05-25
Notice of Ex Parte

Dear Ms. Dortch:

On June 13, 2019, William P. Hunt III, General Counsel, Senior Vice President & Secretary, on behalf of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., all d/b/a TPx Communications ("TPx") (via teleconference), Patricia Cave (via teleconference) and the undersigned of Morgan, Lewis & Bockius LLP ("Morgan Lewis"), met with Arielle Roth, Wireline Legal Advisor to Commissioner Michael O'Rielly and then with Travis Litman, Chief of Staff and Senior Legal Advisor to Commissioner Jessica Rosenworcel.

TPx reiterated its opposition to the nationwide forbearance USTelecom seeks in its Petition for Forbearance (the "Petition").[1] As the petitioner, USTelecom bears a statutory burden to provide "convincing evidence and analysis" that forbearance is in the public interest. Unable to do that, USTelecom now argues that competitive carriers bear the burden to prove forbearance will have an adverse impact on customers receiving competitive voice and broadband service over unbundled network elements ("UNEs").

TPx discussed the adverse impact that forbearance from Section 251(c) obligations would have on its customers. As described in **Attachment 1**, TPx uses UNEs to serve small and mid-sized businesses, schools, libraries and other community anchor institutions in urban and suburban areas primarily in California, Nevada and Texas. TPx uses approximately 122,000 analog DS0 loops (xDSL capable) to support Ethernet-over-Copper ("EoC") and approximately 148,000 analog DS0 loops to provide Plain Old Telephone Service

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1 *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) to Accelerate Investment in Broadband and Next-Generation Networks,* WC Docket No. 18-141 (filed May 4, 2018).

("POTS"), which its customers use for telephone service, fax machines, key systems, and alarm services. In addition to loops for POTS, TPx uses approximately 12,000 resold POTS lines. TPx's local government customers, among others, continue to rely on POTS (through UNEs or resale) for reliability and alarm systems, and VoIP or other over-the-top solutions are insufficient to meet their need for a self-powered and reliable line. TPx also uses bonded and single DS1 UNEs to provide voice and data services. In many cases, TPx's use of UNEs allows its customers to enjoy more innovative services at lower price points than are available from the incumbent LECs.

Despite USTelecom's claims, the reality of accessible, "in-the-ground" networks reveals a stark lack of competitive alternatives to UNEs. For example, only about 25 percent of TPx's existing EoC customers have fiber available in the building and another 50 percent of its customers have fiber within 500 feet of the customer premises.[2] Even in central business districts and suburban areas, the construction and other non-recurring charges ("NRCs") for deploying fiber the last 500 feet have been prohibitive, ranging from approximately $20,000 to over $200,000.[3] Small business customers are often unwilling to pay these costs. TPx's average customer requires only a 10-15 Mbps service and some well-known fiber providers – who are being presented as competitive alternatives – will not provision fiber for the low bandwidth services that TPx's customers require. Compounding the lack of competitive alternatives is that the presence of a cable provider in a census block does not mean the cable plant is capable of delivering the symmetric 10-15 Mbps EoC provides or that the cable company will extend its plant to the office parks and other locations where small and medium business customers are located.

Without a cable alternative or UNE-based competition, there is no constraint on pricing that incumbent LECs could charge for their retail services. The impact of forbearance on competitive providers and their customers will be immediate rate increases imposed by the incumbent LEC for continued access to the same copper facilities used to serve them today. Alternatively, if TPx cannot find an economical alternative last mile solution (which may not be available absent a new build), customers may lose service from the CLEC – often the only competitive alternative to the incumbent LEC – at their location.

TPx reiterated its opposition to use of the *BDS Order* data and Form 477 broadband availability data to find competition sufficient to justify forbearance. First, the *BDS Order* did not analyze the voice or combined voice and broadband markets, both of which are at issue in this proceeding. Second, the Commission's findings in the *BDS Order* relied in

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[2] These statistics are derived solely from the smaller, tailored network footprint of TPx. TPx's networks are not ubiquitous across the historic operating territory of AT&T as a Regional Bell Operating Company. Competitive LECs have much smaller footprints than the Petitioners'. It would be irrational to assume that if 25 percent of TPx's customers have an alternative fiber provider their location, the Commission can extrapolate that to other locations in the AT&T operating territory.

[3] *See* Opposition of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., WC Docket No. 18-141, at 20-23 (filed Aug. 6, 2018) ("TPx Opposition").

part on competition made possible via UNEs. Third, USTelecom is asking the Commission to rely on Form 477 broadband availability data here because it benefits the incumbent LECs to do so, despite acknowledgment by USTelecom in other proceedings that the Form 477 data is flawed.[4]

Beyond the use of data that is unfitting (in the case of BDS) or severely flawed (in the case of Form 477), there is nothing in the record beyond unenforceable "commitments" upon which the Commission could make a reasoned decision about competition and economics in a post-forbearance market. The incumbent LECs' argument that UNE rates are artificially low and have not changed since adoption of the Telecommunications Act are wrong. Rather than litigating a UNE cost case, AT&T and Frontier entered into voluntary settlements with CALTEL freezing or limiting increases on UNE rates in California through 2020.[5]

TPx opposes forbearance. However, if the Commission determines that forbearance is warranted (on a nationwide or more limited basis), TPx presented a number of principles to guide a post forbearance world:

1. The Commission must provide a reasonable transition period – TPx recommends seven years[6] to ensure that customers of competitive LECs are able to maintain their existing services and provider(s) (*See* **Attachment 2**).
2. For UNEs ordered or in service in a carrier's embedded base prior to the effective date of any grant of forbearance, the rates will remain at the UNE rate

[4] *See* Letter from B. Lynn Follansbee, Vice President – Law and Policy, USTelecom—The Broadband Association to Ms. Marlene Dortch, Secretary, FCC, WC Docket Nos. 11-10, 10-90, & 19-126 (filed May 31, 2019) (asserting that its Broadband Mapping Initiative "will allow the FCC to determine the service status of all locations and thus accurately identify how many locations still lack robust broadband. This Initiative is critical for [Rural Digital Opportunity Fund] because it will create an authoritative, agreed upon count of unserved locations"); Letter from B. Lynn Follansbee, Vice President – Law and Policy, USTelecom—The Broadband Association to Ms. Marlene Dortch, Secretary, FCC, WC Docket Nos. 11-10 & 10-90, at 1 (filed March 21, 2019) (arguing that its proposed broadband reporting mechanism would create "dramatically more accurate FCC Form 477 reporting" to replace the current census block reporting method that relies on a "one-served-all served basis for deployment data that has become less reliable as a tool"); Testimony of Jonathan Spalter President and CEO, USTelecom before the Senate Commerce Committee "Broadband Mapping: Challenges and Solutions," at 2 (April 10, 2019) (testifying before the Senate Commerce Committee that Form 477 data tends to overstate broadband availability).

[5] *See* Reply Comments of CALTEL, WC Docket No. 18-141, at 21-25 (filed Sept. 5, 2018).

[6] A seven-year transition is consistent with the transition adopted by the Commission for reducing intercarrier compensation in incumbent LEC price cap territories. *See Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*; WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17934, ¶ 801 (2011); *aff'd sub nom., In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

during the transition period. During the transition, carriers would be able to order maintenance and replacement loops for the embedded base at UNE rates.

3. For loops ordered after the grant of forbearance, incumbent LECs will be allowed to negotiate nominal, incremental increases for UNEs with the rate determined based on the year the loops were ordered and remain frozen throughout the transition period (*i.e.*, rates for UNEs ordered in Year Two should apply to those loops throughout completion of the transition in Year Seven. The rates for UNEs ordered in Year Three would remain the same through Year Seven.).
4. At the expiration of the transition, incumbent and competitive LECs should be required to use mutual best efforts to negotiate commercial terms to successor arrangements.
5. The incumbent LECs must be prohibited from imposing or increasing fees they charge in the provisioning, record-keeping or maintenance related activities with respect to a carrier's embedded base of UNEs.

These principles will ensure that existing customers are not harmed (through rate increases or loss of services or competition) during the transition and provide sufficient time for competitive LECs to determine whether alternative last-mile access solutions are available.

Finally, TPx summarized the legal and other arguments in its opposition to the Petition.[7] USTelecom has not defined the relevant geographic or product markets. Forbearance orders diverging from the geographic retail and wholesale product market analysis of *Qwest Phoenix* focused on (a) advanced services (*i.e.*, broadband elements) and new network investment, (b) the market for enterprise services provided to customers with nationwide presence, or (c) lack of evidence that competitive providers were *actually relying* on the regulations at issue.[8] Similar to the *BDS Order*, those orders also relied on Section 251 UNEs as a regulatory "backstop" to the potential negative consequences of granting nationwide forbearance. Because the record shows continued reliance on UNEs for competition, and due to the differences between the Petition and the Commission's prior grants of nationwide forbearance, the Commission should apply the *Qwest Phoenix* standard and find USTelecom failed to meet its burden. Because the record shows Section 251(c) UNE and resale obligations are critical to enable competition in *local* markets, the Commission should reject the Petition and permit incumbent LECs to achieve "natural forbearance" by deploying fiber and retiring their copper facilities.

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[7] *See generally* TPx Opposition; Reply Comments of U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., WC Docket No. 18-141 ("TPx Reply Comments") (filed Sept. 5, 2018); U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc. Support for Motion for Summary Denial, WC Docket No. 18-141 ("TPx Summary Denial Support") (filed Sept. 5, 2018).

[8] TPx Opposition, at 11-16.

Because USTelecom has not and cannot meet its burden, the Commission should deny the Petition. Even if the Commission finds that limited forbearance is appropriate, it should provide a transition period long enough to avoid the substantial disruption and cost to customers that forbearance would cause.

Sincerely,

/s/ Tamar E. Finn

Tamar E. Finn
Patricia Cave

Counsel to U.S. TelePacific Corp., Mpower Communications Corp., and Arrival Communications, Inc., all d/b/a TPx Communications

cc: (Via E-Mail)
Arielle Roth, Wireline Advisor to Commissioner Michael O'Rielly
Travis Litman, Chief of Staff and Senior Legal Advisor to Commissioner Jessica Rosenworcel

Attachments:
Attachment 1 – Fact Sheet: TPx Communications' Use of Section 251(c) UNEs and Resold Lines
Attachment 2 – TPx Communications' Forbearance Principles

<u>ATTACHMENT 1</u>

Fact Sheet: TPx Communications' Use of Section 251(c) UNEs and Resold Lines

<u>Fact Sheet:</u>
<u>TPx Communications' Use of Section 251(c) UNEs and Resold Lines</u>

- TPx's customers appreciate the innovative voice and data services TPx puts in place leveraging fiber, Ethernet over Copper and DS1s to maximize bandwidth and provide flexibility to adapt to their needs.

- TPx uses unbundled network elements ("UNEs") to serve tens of thousands of customers primarily in California, Nevada, and Texas.

    - Approximately 122,000 analog DS0 loops to support Ethernet-over-Copper ("EoC") services.
    - Approximately 148,000 analog DS0 loops to support business Plain Old Telephone Service ("POTS").
    - Approximately 22,000 UNE DS1s to support business voice and data services (using bonded and single DS1s).
    - Approximately 12,000 resale lines to support business POTS (including to support fax machines, alarm services, and key telephone systems).
    - TPx uses Operations Support Systems and 911 UNEs to provide service, including to its non-UNE based customers (*e.g.*, customers served via Ethernet or special access circuits).
    - TPx incurs substantial monthly collocation costs to serve its customer base using UNEs.

- No commercial alternatives for **<u>bare copper analog DS0 loops</u>** exist today.

- TPx often moves customers to fiber or its fixed wireless solution where available.

    - Only 25 percent of TPx's customers have fiber at their location.
    - In TPx's experience, fiber providers are not likely to build to customers with low-bandwidth demands (e.g., a typical TPx customer requires only 10-20 Mbps).
    - Not all customers can afford move to fiber-based Ethernet service at triple the monthly recurring cost for EoC and after special construction and applicable non-recurring provisioning costs.

- "[F]or California at least, any complaints about 'artificially low' UNE rates should be disregarded, because both ***AT&T and Frontier have repeatedly and voluntarily entered into settlement agreements with CALTEL that either froze CPUC-adopted rates or adjusted them annually*** based on a negotiated price cap formula indexed to the rate of inflation." (Reply Comments of CALTEL, WC Docket No. 18-141, at 25 (filed Sept. 5, 2018) (emphasis added).)

<u>ATTACHMENT 2</u>

TPx Communications' Forbearance Principles

TPx Communications' Forbearance Position

- USTelecom and the incumbent LECs have not met their burden to provide "convincing evidence and analysis" that nationwide forbearance from UNE obligations is in the public interest.
    - The *BDS Order* did not analyze the voice or combined voice and broadband markets.
        - Reliance on flawed Form 477 data to make determinations about the status of facilities-based competition would not be reasoned decision making.
        - Incumbent LECs have a 75 percent market share for Plain Old Telephone Service ("POTS").
    - The ILECs have failed to provide any evidence that market conditions will constrain their ability to impose whatever price increase they seek post forbearance. Granting forbearance will lead to immediate increases in pricing for consumers and competitive providers.
        - ILECs will use their copper facilities to provide the same services at higher prices to consumer and business customers.
        - ILECs will abandon the cost plus reasonable profit model mandated by Congress.
    - Absent enforceable commitments regarding the incumbent LECs' commercial alternatives, forbearance would be arbitrary and capricious and conflict with the *BDS Order's* reliance on the continued availability of UNEs to constrain BDS prices.
    - Unbundling does not deter fiber investment because incumbent LECs have the right to retire copper to end their unbundling obligations when they build fiber.
- If the Commission grants forbearance (on a nationwide or partial basis), it should provide a reasonable transition period for customers of competitive LECs to maintain voice and broadband service as their preferred provider transitions away from UNEs.
- If the Commission grants any forbearance relief, TPx proposes that the Commission adopt the following principles:
    - A minimum seven (7) year transition period for customers and competitive providers to move off of UNEs. A short transition period would be highly disruptive and costly to everyone but the incumbent LECs.
    - Rates charged for UNEs *in service or ordered* prior to the effective date of any forbearance order ("embedded UNEs") should be frozen at the UNE rate throughout the transition period.

- Rates for UNEs ordered following forbearance should be determined by the year in which the UNE is ordered.

    - For example, UNEs ordered in Year One post-forbearance could increase by a small amount from the embedded base rates. Year Two rates could increase by a small amount from Year One, etc.

    - Rates charged for network facilities ordered following forbearance should be frozen for the remainder of the transition period. For example, Year Two rates should apply to all UNEs ordered in Year Two throughout the transition.

- During the transition period, incumbent LECs should be prohibited from increasing the rates for any fees associated with the ordering, provisioning or installation of any network element or facility that is the subject of a grant of forbearance.

- Incumbent LECs and competitive LECs should be required to use mutual best efforts to negotiate commercial terms and transition UNEs to successor arrangements.